Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

NO. 73-1157

RICHARD E. GERSTEIN and ROBERT L. SHEVIN

Appellants,

-vs-

NANCY COE, PATRICIA NOE and DR. LYNN P. CARMICHAEL, and all others similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

JURISDICTIONAL STATEMENT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

NO.

RICHARD E. GERSTEIN and ROBERT L. SHEVIN

Appellants,

-vs-

NANCY COE, PATRICIA NOE, and
all others similarly situated,

Appellees.

ON APPEAL FROM THE UNITED
STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JURISDICTIONAL STATEMENT

This is an appeal from a decision of a three-judge court in the Federal District Court, Southern District of Florida, declaring that the "husband's consent" and "parental consent" provisions of the Florida abortion statute are unconstitutional. The same decision recommended that Florida law enforcement officers should refrain from enforcing those provisions of the statute.

OPINION BELOW

This is an appeal from an order of th Southern District Court of Florida in Ca No. 72-1842-Civ-JE, dated August 13, 197 as corrected on August 29, 1973. Petiti for rehearing was denied in an order dat October 29, 1973. These unreported opin ions are set out in the appendix.

JURISDICTION

Notice of appeal was filed by the de dants on November 28, 1973. Petition f rehearing having been denied on October 1973, said notice was timely filed. St tory authority for this appeal is 28 U. 1253. Plaintiffs filed their corrected notice of appeal from the denial of inj tive relief on December 10, 1973.

This Court indicated in Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) that direct appeal to this Court was appropriate under similar cir cumstances.* Further, the declaratory relief statute, 28 U.S.C. 2201, defini- tively states that such relief amounts a final decree.

This Court has granted a direct appe on pendency grounds when the ruling on

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*Justice Blackmun also indicated tha certiorari, pursuant to Rule 20, could an alternative route in some cases.

declaratory relief was inextricably related to the injunctive count as is the case herein. Cf. Zwickler v. Koota, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 244; Samuels v. Mackell, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed. 2d 688.

STATUTORY PROVISIONS IN QUESTION

Those portions of Florida's abortion statute, which were involved in the decision, appear below. The entire statute, Florida Statute §458.22, appears in the appendix.

QUESTIONS ON APPEAL

I

DID THE THREE-JUDGE PANEL ERR IN DECLARING THE "PARENTAL CONSENT" PROVISIONS OF FLORIDA STATUTE §458.22 TO BE UNCONSTITUTIONAL, AND, IN EFFECT, ENJOINING THE ENFORCEMENT OF SAID LAW ON THE BASIS THAT THIS COURT'S DECISIONS IN ROE V. WADE, 410 U.S. 113, 93 S.Ct. 75, 35 L.Ed. 2d 173, AND DOE V. BOLTON, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed. 2d REQUIRED THAT RESULT?

II

DID THE THREE-JUDGE PANEL ERR IN DECLARING THE "HUSBAND'S CONSENT" PROVISIONS OF FLORIDA STATUTE §458.22 TO BE UNCONSTITUTIONAL, AND, IN EFFECT, ENJOINING THE ENFORCEMENT OF

SAID LAW ON THE BASIS THAT THIS COURT'S DECISIONS IN ROE V. WADE, SUPRA, AND DOE V. BOLTON, SUPRA, ALLEGEDLY REQUIRED THAT RESULT?

FACTS PERTINENT TO THIS CASE

This suit was originally brought by six plaintiffs. Plaintiff Paula Poe (pseudonym) alleged that her husband would not consent to an abortion, if asked, and that under the Florida Statute in question, she was thereby prohibited from obtaining an abortion. Plaintiff Rita Roe (pseudonym) alleged that she was an unmarried minor and that her parents would not consent to an abortion. She, too, would have been prohibited from obtaining an abortion under Florida law.

Plaintiff Pamela Harris sued in her capacity as an abortion counselor, who was allegedly limited in her capacity to recommend abortions because of the contested provisions of the Florida statute. Drs. Carmichael, Shore and Herman alleged that the parental and husband consent provisions limited their capacity to carry out the practice of medicine.

In an order dated December 28, 1972, plaintiffs Poe and Roe were dismissed. Subsequently, plaintiffs Coe and Noe intervened. These two plaintiffs were also prevented from obtaining abortions by the husband's consent provision and the parental consent provision, respectively.

A three-judge court was convened. That nel granted declaratory relief as to the o provisions in question. They also ated that they assumed that the appro- iate state officials would abide by the ling.

SUBSTANTIAL FEDERAL QUESTION

This Court, in two landmark cases, has led that at least in regard to the first imester of pregnancy, state criminal abor- on statu.es violated the right of privacy unded in the Fourteenth Amendment. Roe Wade, 410 U.S. 113, 93 S.Ct. 705, 35 Ed.2d 147 (1973); Doe v. Bolton, 410 U.S. 9, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973). is Court also pointed out in those deci- ons that not all limitations upon abor- ons were constitutionally impermissive.

The Roe decision specifically indicated at the ruling did not encompass the ques- ons of the constitutional validity of rental consent and husband's consent re- irements contained in many state statutes. Footnote 67). The decision of the Southern strict Court of Florida dealt with those o provisions, and essentially held that e and Doe dictated that those requirements held unconstitutional.

The decision of the three-judge court that case clearly involves a substantial deral question. Including Florida, at ast ten states have either one or both those provisions in their present laws.*

*The 1973 statutes of several states ere not available to us at the time this rief was prepared.

Further, insofar as abortions are essentially lawful in every state (at least during the first trimester), the question of whether or not a husband's consent may be required, or whether parental consent may be required for an unmarried minor, affects all of our states.

Since abortion laws in most states have been restrictive in their nature prior to this Court's decisions in Roe and Doe, there is very little case law on this subject. Therefore, innumerable conflicting State and Federal decisions may be anticipated until this Court resolves these issues. Obviously, there would be general uncertainty produced by conflicting decisions in various jurisdictions, and an inconsistency in terms of the effect upon the lives of citizens in different states or federal districts. Such uncertainty of the law in regard to a literal life or death matter would be most undesirable. Therefore, definitive guidance from this Court is required so that life will not be prevented through abortion, nor will an abortion be prohibited for any individual without the foundation of clearly established constitutional guidelines.

It would, indeed, be a tragedy for anyone affected by this issue to learn that a lower court ruling permitting or prohibiting abortion based upon consent requirements was subsequently reversed by this Court. A prompt hearing and ruling by this Court would preclude such occurrences.

It is obvious, therefore, that the issues involved in this appeal present

a substantial Federal question. Does the constitutional right to privacy permit the states to require a husband's consent or parental consent prior to an abortion? That question is presently unanswered and can only be effectively answered by this Court.

CONCLUSION

Based upon the reasons and authorities set forth above, it is urged that this Court take jurisdiction of the appeal in this cause.

Respectfully submitted,

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January 1974

APPENDIX

OPINION OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA

CASE NO. 72-1842

NANCY COE, PATRICIA NOE, et al.,

Plaintiffs,

v.

RICHARD E. GERSTEIN, etc., et al.,

Defendants.

Before DYER, Circuit Judge, MEHRTENS and EATON, District Judges.

This class action for declaratory and injunctive relief, heard by a duly convened three-judge district court, is a constitutional challenge to Florida's regulation of therapeutic abortions. Three plaintiffs in this proceeding -- Carmichael, Shore and Herman -- are Florida-licensed physicians practicing in the field of Family Medicine. They attack the constitutionality of Fla. Stat. Ann. §458.22(3) (1972) [hereinafter the "spousal or parental consent" requirement][1];

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1. "F.S.A. sec. 458.22(3) Writings required.--

"One of the following shall be obtained by the physician prior to terminating a pregnancy:

and §10D-0.05 of Rules on Termination of Pregnancy, Division of Health, Ch. 10D-05 (1972) [hereinafter "Rules", Ch. 10D-05], prohibiting public advertisement of medical facilities available for the termination of pregnancies. The complaint was filed prior to January 22, 1973, the date on which the United States Supreme Court handed down its decisions in Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) and Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973).

---

*(a) The written request of the pregnant woman and, if she is married, the written consent of her husband, unless the husband is voluntarily living apart from the wife, or

(b) If the pregnant woman is under eighteen years of age and unmarried, in addition to her written request, the written consent of a parent, custodian or legal guardian must be obtained, or

(c) Notwithstanding paragraphs (a) and (b) of this subsection, a physician may terminate a pregnancy provided he has obtained at least one corroborative medical opinion attesting to the medical necessity for emergency medical procedures and to the fact that to a reasonable degree of medical certainty the continuation of the pregnancy would threaten the life of the pregnant woman."

Subsequent to that date plaintiffs Coe[2] and Noe[3], two females each pregnant for less than three months, were permitted to intervene. They join the physician-plaintiffs in attacking the constitutionality of the "spousal or parental consent" requirement, and in addition, challenge both Fla. Stat. Ann. §458.22(2) (1972) [hereinafter the "approved facility" requirement], and Ch. 10D-65 of the "Rules" in its entirety -- on the grounds that they are constitutionally impermissible State interferences with a woman's right of privacy, as that right encompasses the decision to terminate a pregnancy. The defendants are officials of the State of Florida charged with the enforcement of the disputed sections of the statute and the rules promulgated under the statute.

The State of Florida has expressly abandoned any defenses relating to the "approved facility" requirement or to the "Rules", Ch. 10D-65 in its entirety, acknowledging that these issues are foreclosed by the decisions in Roe v. Wade,

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2. Plaintiff Coe is a real person suing under a pseudonym to preserve her anonymity. She is a married woman unable to obtain her husband's consent for a therapeutic abortion which her physician has certified to be necessary to preserve her health. She is a citizen of Florida and a resident of this District.

3. Plaintiff Noe is a real person suing under a pseudonym to preserve her anonymity. She is an unmarried minor unable to obtain parental consent for a therapeutic abortion which is necessary to preserve her health. She is a citizen of Florida and a resident of this District.

supra, and Doe v. Bolton, supra. We agree that these issues are foreclosed and hold that F.S.A. §458.22(2), the "approved facility" requirement, and the Division of Health Rules, Ch. 10D-65, are constitutionally invalid because they make no distinction between the first trimester of pregnancy, a period in which the State may not interfere by regulating a woman's decision to terminate a pregnancy, and the latter trimesters where the State may impose regulations reasonably related to the preservation and protection of maternal health. Roe v. Wade, 93 S.Ct. at 731-32. In addition, neither the statute nor the "Rules" makes any distinction between the period prior to viability of the fetus, a period in which the State has no compelling interest in preserving and protecting potential life, and the period after viability where the State may regulate the termination of pregnancy to protect potential life. Id. Since the "approved facility" requirement and the "Rules" do not make these distinctions, they "sweep too broadly . . . [and], therefore, cannot survive the constitutional attack made upon [them] here." Id. at 732.

The only issue which the State of Florida has contested is plaintiffs' constitutional attack on F.S.A. §458.22(3), the "spousal or parental consent" requirement. Roe v. Wade, supra, and Doe v. Bolton, supra, are not directly in point on this question. Those cases dealt specifically with the State's interest in the protection of potential life, which may be termed the interest of the fetus, and the State's interest in the protection of maternal health, which may be termed the interest of the mother. They did not address the

interests of third parties, such as the husband or father, or the parents of an ummarried pregnant female minor. Neither issue was raised by the factual or statutory setting of the two cases, and the Supreme Court did not decide the constitutionality of these types of consent provisions.[4]

In Roe v. Wade, supra, the Supreme Court concluded that "the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation." 93 S.Ct. at 727. State regulation limiting this right "may be justified only by a 'compelling state interest'." Id. at 728. Compelling state interests were recognized in two areas: (1) the State may intervene and regulate abortions to protect maternal health after approximately the end of the

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4. "Neither in this opinion nor in Doe v. Bolton, post, do we discuss the father's rights, if any exist in the constitutional context, in the abortion decision. No paternal right has been asserted in either of the cases . . . . We are aware that some statutes recognize the father under certain circumstances. North Carolina, for example . . . requires written permission for the abortion from the husband when the woman is a married minor, that is, when she is less than 18 years of age . . .; if the woman is an unmarried minor, written permission from the parents is required. We need not now decide whether provisions of this kind are constitutional." Roe v. Wade, 93 S.Ct. at 733.

first trimester of pregnancy, and (2) the State may intervene and regulate, or even proscribe, abortions after the fetus becomes viable. Id. at 731-732. The State is therefore forbidden from any regulation, at least in order to protect maternal health or potential life, until these "compelling points" are reached; as a result, the pregnant woman's right of privacy is "sole" during the first trimester. Id. at 730.

We are persuaded that if the State cannot interfere to protect the fetus' interest in its potential life until the compelling point of viability is reached, neither can it interfere on behalf of husbands or parents to protect their interests in that potential life until the fetus becomes viable. We are persuaded, also, that if the State cannot interfere to protect the pregnant woman's physical or mental health until approximately the end of the first trimester, neither can it interfere on behalf of husbands or parents to protect their interests in her health until that point is reached. If the State could demonstrate that the third-party interests sought to be protected by this provision attach at the moment of conception and are interests which fall completely outside the categories of protection of maternal health and potential life, Roe v. Wade, supra, would not be controlling and the provisions would withstand constitutional attack.

We recognize that the interest of the husband in the embryo or fetus carried by his wife, especially if he is the father,[5] is qualitatively different from the interest which the mother may have in her health and the interest of the viable fetus in its potential life. The interest which a husband has in seeing his procreation carried full term is, perhaps, at least equal to that of the mother. The biological bifurcation of the sexes, which dictates that the female alone carry the procreation of the two sexes, should not necessarily foreclose the active participation of the male in decisions relating to whether their mutual procreation should be aborted or allowed to prosper. It may be that the husband's interest in this mutual procreation attaches at the moment of conception.

We recognize further that the interest of parents within a family unit is qualitatively different, at least in part, from the interest which a pregnant minor daughter may have in her maternal health and the interest which the viable fetus may have in its potential life. The State of Florida has urged persuasively that the family unit is, except by positive provision of state law to the contrary, a self-governing entity and that the traditional and primary obligation for the custody, care, control, and nurture of minor children resides in their parents.

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5. We recognize that the husband of the pregnant woman may not always be the father of the potential child. We do not undertake to discuss the situation where the husband is not the father of the potential child, since the statute does not purport to deal with such a situation.

But while these paternal and parental interests may be compelling, and may in fact exist at the moment of conception, it is apparent that not all paternal or parental interests fall outside the categories of protection of maternal health and potential life. We cannot avoid the conclusion that at least a portion of the interests which husbands and parents have in their pregnant wives or minor daughters may be reasonably related to protection of maternal health and protection of potential life. The failure of the Florida "spousal or parental consent" requirement is that it gives to husbands and parents the authority to withhold consent for abortions for any reason or no reason at all. It allows a husband or parent to withhold consent out of concern for maternal health or the potential life of the fetus, in addition to other compelling reasons each may have for doing so.

As we learn from Roe v. Wade, supra, the State has no authority to interfere with a woman's right of privacy in the first trimester to protect maternal health nor can it interfere with that right before the fetus becomes viable in order to protect potential life. It follows inescapably that the State may not statutorily delegate to husbands and parents an authority the State does not possess.

We do not learn from the opinion in Roe v. Wade, supra, the age of plaintiff Roe, the pregnant woman who enjoyed the "fundamental", "personal right of privacy" [emphasis supplied] recognized by the Supreme Court. But we do know that a pregnant woman under 18 years of age

not, under the law, be distinguished
n one over 18 years of age in reference
"fundamental", "personal", constitu-
nal rights.

Accordingly, we are compelled to hold
.A. §458.22(3), the "spousal or paren-
consent" requirement unconstitutional.[6]
ce the primary substantive section of
Florida Abortion Act. F.S.A. §458.22
unconstitutional, the minor procedural
definitional provisions are no longer
ported and the entire Act is invalid.

In holding the Florida "spousal or
ental consent" requirement unconsti-
ional, this Court, of course, does
limit the traditional and substan-
l right which husbands and parents
e in asserting their respective in-
ests within the family unit. Cer-
nly husbands ought to participate
h their wives in decisions relating
whether or not their mutual procre-
on should be aborted or allowed to
sper, and parents ought to advise and
de their unmarried, minor daughters in
ecision of such import. But a state
ch has no power to regulate abortions
certain areas simply cannot constitu-
nally grant power to husbands and

Because of the practical problems
olved in drafting or enforcing a
tute which would exclude interests
ated to maternal health in the first
mester, we are inclined to agree with
Justice Rehnquist (dissenting) that,
a practical matter, "a State may im-
e virtually no restrictions on the
formance of abortions during the
st trimester of pregnancy." Roe v.
e, 93 S.Ct. at 736.

parents to regulate in those areas. Therefore, husbands and parents cannot look to the state to prosecute and punish the physician (or other participants) who performs an abortion against the wishes of the husbands and parents.

We find it unnecessary to provide plaintiffs injunctive relief. We assume the defendants and other state officials charged with enforcement of the invalidated statute and its derivative rules will give full recognition to the judgment of this Court.

The Court retains jurisdiction to enter whatever orders necessary to be entered to effectuate this declaratory judgment.

Dated at Miami, Southern District of Florida, this 13th day of August, 1973.

David W. Dyer
United States Circuit Judge

W. O. Mehrtens
United States District Judge

Joe Eaton
United States District Judge

ORDER OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA

CASE NO. 72-1842-Civ-JE

ORDER UNDER RULE 60 FEDERAL RULES OF CIVIL PROCEDURE

NANCY COE, PATRICIA NOE, et al.,

Plaintiffs,

-v-

RICHARD E. GERSTEIN, etc., et al.,

Defendants.

In issuing its Opinion in this case on ust 13, 1973, the Court overlooked the t that at least one provision of Florida tute 458.22, not under attack in this e, is neither a minor procedural or finitional provision. Therefore, it is

ORDERED and ADJUDGED that the second tence of the third paragraph of page bered six of the Opinion is hereby eted from the opinion. That sentence d as follows:

"Since the primary substantive sections of the Florida Abortion Act, F.S.A. 458.22 are unconstitutional, the minor procedural and definitional provisions are no longer supported and the entire Act is invalid."

The effect of this correctional order that only those sections of F.S.A. .22 that are directly attacked,

specifically section 458.22(2) and section 458.22(3), have been declared unconstitutional.

This Court's opinion of August 13th, 1973 is otherwise unaffected by this Order.

DONE and ORDERED at Miami, Southern District of Florida, this 22 day of August, 1973.

David W. Dyer
United States Circuit Judge

W. O. Mehrtens
United States District Judge

Joe Eaton
United States District Judge

ORDER OF THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 72-1842-Civ-JE

NANCY COE, PATRICIA NOE, ET AL.,

Plaintiffs,

vs.

RICHARD E. GERSTEIN, ETC., ET AL.

Defendants.

The Petition for Rehearing heretofore filed in this case is hereby DENIED.

David W. Dyer
United States Circuit Judge

W. O. Mehrtens
United States District Judge

Joe Eaton
United States District Judge

Enter: this _____ day
of October, 1973.

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 72-1842-Civ-JE

NANCY COE, PATRICIA NOE, and
all others similarly situated,

Plaintiffs,

vs.

RICHARD E. GERSTEIN, State Attorney
for the Eleventh Judicial Circuit,

WILSON T. SOWDER, Director, Division
of Health, State of Florida,

ROBERT L. SHEVIN, Attorney
General of Florida,

their agents, those acting in concert
with them, and all others
similarly situated,

Defendants.

I. The defendants Richard E. Gerstein and Robert L. Shevin hereby file their notice of appeal with the Clerk of the Federal Court, Southern District of Florida. The defendants are appealing from the final order of a three-judge panel in the above styled cause dated

August 13, 1973, as corrected August 23, 1973. Petition for rehearing was denied October 29, 1973.

This appeal is taken pursuant to 28 U.S.C.A. 1253.

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the entire record of the proceedings in the instant cause.

Please instruct the Court Reporter to transcribe the notes of the oral argument which took place on March 13, 1973, and to submit that transcription with the other portions of the record in this cause.

III. The following questions are presented by this appeal:

A. DID THE THREE-JUDGE PANEL ERR IN DECLARING THE "PARENTAL CONSENT" PROVISIONS OF FLORIDA STATUTE §458.22 TO BE UNCONSTITUTIONAL, AND, IN EFFECT, ENJOINING THE ENFORCEMENT OF SAID LAW ON THE BASIS THAT THIS COURT'S DECISIONS IN ROE V. WADE, 410 U.S. 113, 93 S.Ct. 75, 35 L.Ed.2d 173, AND DOE V. BOLTON, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d REQUIRED THAT RESULT?

B. DID THE THREE-JUDGE PANEL ERR IN DECLARING THE "HUSBAND'S CONSENT" PROVISIONS OF FLORIDA STATUTE §458.22 TO BE UNCONSTITUTIONAL, AND, IN EFFECT, ENJOINING THE

ENFORCEMENT OF SAID LAW ON THE BASIS THAT THIS COURT'S DECISIONS IN ROE V. WADE, SUPRA, AND DOE V. BOLTON, SUPRA, ALLEGEDLY REQUIRED THAT RESULT.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and corre copy of the foregoing Notice of Appeal to the Supreme Court of the United States wa furnished by mail to Roy Lucas, Esquire, Suite 1501, Watergate South, Washington, D. C., 20037, and to Joseph P. Farina, Esquire, 9717 Northeast Second Avenue, Miami Shores, Florida, 33138, Attorneys for Plaintiffs, this 28th day of November 1973.

J. ROBERT OLIAN
Chief Counsel, South Florida Of
Assistant Attorney General

Florida Statute §458.22.--Termination of pregnancies.

(1) DEFINITIONS.--As used in this section, unless the context clearly requires otherwise:
(a) "Physician" means a doctor of medicine or osteopathic medicine licensed by the state under chapter 458 or chapter 459 or a physician practicing medicine or osteopathy in the employment of the United States or this state.
(b) "Approved facility" means a hospital licensed by the state and accredited by the Joint Commission on Accreditation of Hospitals or approved by the American Osteopathic Hospital Association or a medical facility licensed by the division of health pursuant to rules and regulations adopted for that purpose, provided such rules and regulations shall require regular evaluation and review procedures.
(2) TERMINATION OF PREGNANCY.--It shall be unlawful to terminate the pregnancy of a human being unless the pregnancy is terminated in an approved facility by a physician who certifies in writing that:
(a) To a reasonable degree of medical certainty the continuation of the pregnancy would substantially impair the life or health of the female; or
(b) There is substantial risk that the continuation of the pregnancy would result in the birth of a child with a serious physical or mental defect; or
(c) There is reasonable cause to believe that the pregnancy resulted from rape or incest.
(3) WRITINGS REQUIRED.--One of the following shall be obtained by the physician prior to terminating a pregnancy:

(a) The written request of the pregnant woman and, if she is married, the written consent of her husband, unless the husband is voluntarily living apart from the wife, or
(b) If the pregnant woman is under eighteen years of age and unmarried, in addition to her written request, the written consent of a parent, custodian, or legal guardian must be obtained, or
(c) Notwithstanding paragraphs (a) and (b) of this subsection, a physician may terminate a pregnancy provided he has obtained at least one corroborative medical opinion attesting to the medical necessity for emergency medical procedures and to the fact that to a reasonable degree of medical certainty the continuation of the pregnancy would threaten the life of the pregnant woman.
(4) REPORTING PROCEDURE.--
(a) The director of any medical facility in which a pregnancy is terminated pursuant to this section shall maintain a record of such procedures. Such record shall include the date the procedure was performed, the reason for same, and the period of gestation at the time the procedure was performed. A copy of such record shall be filed with the department of health and rehabilitative services, which shall be responsible for keeping such records in a central place from which statistical data and analysis can be made.
(b) Records maintained by an approved facility pursuant to this section shall be privileged information and deemed to be a confidential record and shall not be revealed except upon the order of a court of competent jurisdiction in a civil or criminal proceeding.

(5) RIGHT OF REFUSAL.--Nothing in this section shall require any hospital or any person to participate in the termination of a pregnancy, nor shall any hospital or any person be liable for such refusal. No person who is a member of, or associated with, the staff of a hospital nor any employee of a hospital or physician in which or by whom the termination of a pregnancy has been authorized or performed, who shall state an objection to such procedure on moral or religious grounds, shall be required to participate in the procedure which will result in the termination of pregnancy. The refusal of any such person or employee to participate shall not form the basis for any disciplinary or other recriminatory action against such person.

(6) PENALTIES.--

(a) Any person who performs, or participates in, the termination of a pregnancy in violation of the requirements in subsection (2) of this section which does not result in the death of the woman shall guilty of a felony of the third degree, punishable as provided in §775.082, §775.083 or §775.084.

(b) Any person who performs, or participates in, the termination of a pregnancy in violation of the requirements in subsection (2) of this section which results in the death of the woman shall be guilty of a felony of the second degree, punishable as provided in §775.082, §775.083 or §775.084.

(c) Any person who violates any provision of subsections (3) or (4) of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083.

(7) EXCEPTION.--The provisions of this section shall not apply to the performance of a procedure which terminates a pregnancy in order to deliver a live child.

History.--§§1-7, ch. 72-196.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO.

RICHARD E. GERSTEIN and ROBERT L. SHEVIN,

Appellants,

-vs-

NANCY COE, PATRICIA NOE, and
all others similarly situated,

Appellees.

ON APPEAL FROM THE UNITED
STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

AFFIDAVIT OF SERVICE

STATE OF FLORIDA)
) SS
COUNTY OF DADE)

I, J. ROBERT OLIAN, Assistant Attorney General, State of Florida, first being duly sworn according to law, do depose and say:

I HEREBY CERTIFY that a copy of the foregoing JURISDICTIONAL STATEMENT was served upon ROY LUCAS, Esquire, Suite 1501, Watergate South, Washington, D. C., 20037, and to JOSEPH P. FARINA, Esquire,

9717 Northeast Second Avenue, Miami Shores, Florida, 33138, Attorneys for Appellees, by mailing a copy of same to them by United States Mail, First Class postage prepaid, pursuant to Rule 33 of this Court, this _____ day of January, 1974.

J. ROBERT OLIAN
Assistant Attorney General

SWORN TO and SUBSCRIBED BEFORE ME at Miami, Dade County, Florida, this _____ day of January, 1974.

NOTARY PUBLIC
State of Florida

My Commission Expires

FEB 25 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1157

RICHARD E. GERSTEIN and ROBERT L. SHEVIN,
Appellants,

v.

NANCY COE, PATRICIA NOE, DR. LYNN P. CARMICHAEL, and all others similarly situated,
Appellees.

On Appeal from the United States District Court for the Southern District of Florida

MOTION TO AFFIRM OR DISMISS, AND BRIEF

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Appellees.

On Appeal from the United States District Court for the Southern District of Florida

MOTION TO AFFIRM OR DISMISS

Appellees respectfully move the Court to treat the Jurisdictional Statement as a Rule 20 Petition for Writ of Certiorari Before Judgment in the Court of Appeals, grant the writ, and affirm, or in the alternative, to dismiss the appeal for want of jurisdiction under 28 U.S.C. § 1253.

Respectfully submitted,

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Of Counsel:

JOSEPH P. FARINA

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1157

RICHARD E. GERSTEIN and ROBERT L. SHEVIN,
Appellants,

v.

NANCY COE, PATRICIA NOE, DR. LYNN P. CARMICHAEL, and all others similarly situated,
Appellees.

On Appeal from the United States District Court for the Southern District of Florida

BRIEF IN SUPPORT OF MOTION TO AFFIRM OR DISMISS

Appellees respectfully submit this brief in support of the motion to affirm or dismiss.

STATEMENT OF THE CASE

In four respects Appellees must supplement the statement of facts submitted by Appellants.

First, whether the three-judge district court impliedly "recommended" (J.S., at 1, 10a) that Appellants not enforce unconstitutional provisions of the Florida abortion laws or not, that court denied Ap-

pellee's requests for injunctive relief, and even dismissed from the case plaintiffs Paula Poe, Rita Roe, and Pamela Harris. The assumption by the district court that Appellants would recognize the declaratory judgment was the rationale for denying injunctive relief. It was not the grant, but denial of an injunction.

Second, Appellants have appealed only two parts of the declaratory judgment, namely the parental and spouse consent requirements. The judgment, however, invalidated further provisions, which are involved in an appeal to this Court by Appellees, and as to which injunctive relief was also denied.

Third, under JURISDICTION at J.S., p. 2, Appellants state: "Plaintiffs filed their corrected notice of appeal from the denial of injunctive relief on December 10, 1973." The record shows that Plaintiffs' notice of appeal was filed December 21, 1973, not the 10th.

Finally, Appellants' Jurisdictional Statement omits the presence of three Appellees who were dismissed without opinion from the case at preliminary stages—Paula Poe, Rita Roe, and Pamela Harris. The judgment in this case was not final as to any party until denial of rehearing, and these Appellees are all a part of the appeal.

ARGUMENT

I.

The Court Lacks Jurisdiction over this Appeal under 28 U.S.C. § 1253, Because Injunctive Relief Was Not Granted Against or Denied to These Appellants.

The three-judge district court invalidated certain provisions of the Florida abortion law, but "[found] it unnecessary to provide plaintiffs injunctive relief."

(J.S., at 10a). No injunction was entered against Appellants from which to appeal. Only the Appellees were adversely affected by the denial of an injunction. Accordingly, Appellants may not properly appeal here under 28 U.S.C. § 1253. *Bolton* v. *Doe*, 402 U.S. 936 (1971) (per curiam); *McCann* v. *Babbitz*, 400 U.S 1 (1970) (per curiam); *Public Service Comm'n* v. *Brashear Freight Lines*, 306 U.S. 204 (1939) (per curiam). No direct appeal under 28 U.S.C. § 1253 lies from an adverse declaratory judgment. *Mitchell* v. *Donovan*, 398 U.S. 427 (1970). Cases cited by Appellants all involve proper direct appeals by parties adversely affected by the granting or denial of an injunction. This appeal, however, is not such a case.

It follows that the appeal *per se* must be dismissed for want of jurisdiction under 28 U.S.C. § 1253.

II.

The Court Has Jurisdiction To Treat the Appeal as a Rule 20 Petition for Writ of Certiorari before Judgment in the Court of Appeals. Grant the Writ, and Affirm.

The present case involves a bifurcated lower court disposition whereby Plaintiff-Appellees were granted a declaratory judgment, but denied injunctive relief. Under such circumstances, *Roe* v. *Wade*, 410 U.S 113, 123 (1973), recommended for Defendants a Rule 20 petition for certiorari before judgment in the Court of Appeals. Appellants recognize this in a footnote, J.S. at 2.

Turner v. *City of Memphis*, 369 U.S. 350 (1962) (per curiam), took the Rule 20 course. A unanimous Court "treat[ed] appellant's jurisdictional statement as a petition for writ of certiorari prior to judgment in the

Court of Appeals . . . " citing 28 U.S.C. §§ 1254(1), 2101(e).

Appellees recognize the public importance and recurring nature of the questions presented by this appeal. Accordingly, Appellees have no objection to Rule 20 treatment. However, as shall appear, the questions presented appear suitable for summary disposition in light of *Roe* v. *Wade*, 410 U.S. 113 (1973), and *Doe* v. *Bolton*, 410 U.S. 179 (1973).

III.

The Spousal and Parental Consent Clauses of the Florida Abortion Law, F.S.A. § 458.22(3) (a), (b) Are So Plainly Unconstitutional and Overbroad in Light of Roe v. Wade and Doe v. Bolton that Summary Affirmance Is Appropriate.

The present appeal involves two provisions of the Florida Abortion Law, characterized by the three-judge District Court as the "spousal or parental consent" requirements. 15A FLA. STAT. ANN. § 458.22, at 38 (Cum. Pkt. Pt. 1973). These may be treated separately.

A.

The "Spousal Consent Clause" of the Florida Abortion Law Invades a Pregnant Married Woman's Individual Right of Privacy in Violation of the Due Process Clause of the Fourteenth Amendment.

Neither *Roe* nor *Doe*, *supra*, involved an abortion law purporting to bestow veto rights on the pregnant woman's spouse. *Roe*, in fact, expressly declined to address the issue of "the father's rights, if any. . ." 410 U.S. at 165, n.67.

The issue, however, is squarely presented by this appeal. 15A FLA. STAT. ANN. § 458.22(3)(a), at 38

(Cum. Pkt. Pt. 1973), expressly provides that a married woman seeking a therapeutic abortion must provide the physician with "written consent of her husband, unless the husband is voluntarily living apart from the wife" or in case of life-threatening emergency. *Id.* § 458.22(3)(*e*), at 38. This written consent, moreover, amounts to a veto, because the husband may withhold consent for any reason, for reasons forbidden to the State by *Roe* v. *Wade*, or for no reason at all. "[N]o other voluntary medical or surgical procedure for which [Florida] requires confirmation by . . ." the husband can be found. *Cf. Doe* v. *Bolton*, 410 U.S. 179, 199 (1973) (invalidating requirement that two other physicians approve an abortion). No requirement of spouse consent was contained in the Model Penal Code or Uniform Abortion Act proposals. *Doe* v. *Bolton*, *supra*, 410 U.S. at 194.

At least fifteen States, however, require spouse consent by statute for therapeutic abortion under some circumstances amounting to a veto.[1] Nationwide studies on abortion show that substantial numbers of women are affected, in that at least 29.9% of abortion patients are currently married.[2] Hospitals and clinics, of course, may well impose a spouse consent requirement as an added element of presumed self-protection, regardless of local law.

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[1] These are Alaska, Arkansas, Florida, Colorado, Idaho, Indiana, Louisiana, Nebraska, Nevada, Oregon, South Carolina, South Dakota, Virginia, Utah, and Washington. *See* 2 Family Planning/Population Reporter 150-53 (Dec. 1973); *see also* Doe v. Rampton, 366 F. Supp. 189 (D. Utah 1973) (three-judge court) (invalidating entire Utah statute).

[2] *See* Tietze & Lewit, *Joint Program for the Study of Abortion*, 3 Studies in Family Planning 97, 100, Table 1 (June 1972).

Case law provides some guidance.[3] The decision of this Court in *Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972) favors Appellees in stating:

> "If the right of privacy means anything, it is the right of the *individual*, married or single, to be

---

[3] The only three-judge federal court decisions ruling upon spouse consent provisions found them unconstitutional in light of Roe v. Wade, supra, and Doe v. Bolton, supra. These are the present case and Doe v. Rampton, 366 F. Supp. 189 (D. Utah 1973). *See also* Coe v. D.C. General Hosp., Civ. No. 1477-71 (D.D.C. June 5, 1972) (unreported) (spouse consent not required in D.C.).

Periodic injunctive actions to prevent an abortion have uniformly rejected any paternal interest. *See* Jones v. Smith, 278 So.2d 339 (Fla. D. Ct. App. 1973), *petition for cert. filed*, 42 U.S.L.W. 3434 (U.S. Jan. 1, 1974) (No. 73-1133); O'Beirne v. Superior Court, 1 Civ. 25174 (Cal. Sup. Ct. Dec. 6, 1967) (unreported).

A number of tort, malpractice, and contract actions appear to hold that a married woman may consent for herself alone when seeking medical or surgical care. *See* Rosenberg v. Feigin, 119 Cal. App. 2d 783, 260 P.2d 143 (D. Ct. App. 1953); Herko v. Uviller, 203 Misc. 108, 114 N.Y.S.2d 618 (Sup. Ct. 1952); Kritzer v. Citron, 101 Cal. App. 2d 33, 224 P.2d 808 (D. Ct. App. 1950); Burroughs v. Crichton, 48 App. D.C. 596 (1919); Maryland v. Housekeeper, 170 Md. 162, 16 Atl. 382 (1888); M'Clallen v. Adams, 19 Pick. (Mass.) 333 (1837).

Early common law cases often suggest that medical care is a necessity for which a husband is obligated to pay. These date as far back as Harris v. Lee, 1 P. Wms. 482, 24 E.R. 482 (Ch. 1718).

A bizarre variation is an action for separation. Sheldon v. Sheldon, 146 App. Div. 430, 131 N.Y.S. 291 (2d Dep't 1911). Dr. Sheldon had apparently anesthetized his wife each time she became pregnant and aborted her, thereby depriving her "of the maternal joy so highly prized by every good woman . . . ." She was granted the requested separation.

free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." (Emphasis in Opinion).

Similarly, the reasoning of *Roe* v. *Wade* hardly suggests that the important rights recognized there could be swept away by a state law allowing third party veto over exercise of the right. As *Roe* stated:

> "The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically or otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation." 410 U.S. at 153.

It is inconceivable that the Court intended to leave married women and minors wholly unprotected by the *Roe* and *Doe* decisions. Yet, that is the reach of Appellants' position. Moreover, to bestow a veto over the abortion decision is to allow the third party to invoke arbitrary and irrational considerations expressly forbidden to the State itself. This is inconsistent with everything *Roe* stands for.

B.

The "Parental Consent Clause" of the Florida Abortion Law Invades a Pregnant Minor Woman's Individual Right of Privacy in Violation of the Due Process Clause of the Fourteenth Amendment.

Roe and *Doe* also declined to express any view on the constitutionality of state laws bestowing veto rights on the parents of a pregnant minor. 410 U.S. at 165, n.67.

The parental consent issue, however, is squarely presented here. 15A FLA. STAT. ANN. § 458.22(3)(b), at 38 (Cum. Pkt. Pt. 1973), expressly requires the physician to obtain, "[i]f the pregnant woman is under eighteen years of age and unmarried . . . the written consent of a parent, custodian, or legal guardian. . .." except in case of life-threatening emergency. *Id.* § 458.22(3)(c), at 38. This third party consent, moreover, sanctions a veto, because the parents may deny permission for any reason, for reasons denied legitimacy by *Roe* and *Doe*, or for no reason at all. No parental consent provision was embodied in the Model Penal Code or Uniform Abortion Act proposals cited in *Doe* v. *Bolton*, *supra*, 410 U.S. at 194.

At least eighteen States, however, require parental consent by statute for therapeutic abortion in the case of all or some minors, and in circumstances granting a virtual absolute veto.[4] Such provisions have serious

[4] These are Alaska, Arkansas, Florida, Colorado, Delaware, Indiana, Louisiana, Missouri, Nebraska, Nevada, New Mexico, Oregon, South Carolina, South Dakota, Texas, Virginia, Utah, and Washington. *See*, Family Planning/Population Reporter 150-53 (Dec. 1973); Pilpel & Zuckerman, *Abortion and the Rights of Minors*, 23 W. Res. L. Rev. 779 (1972); *see also* Doe v. Rampton, 366 F. Supp. 189 (D. Utah 1973).

impact. As many as 24% of abortion patients are less than 20 years of age.[5] In addition to statutes, minors must also contend with restrictive hospital and clinic rules not necessarily required by statute or case law.

The language and rationale of *Roe* v. *Wade*, 410 U.S. 113 (1973), apply with equal or greater force to protect the right of privacy of a pregnant minor from parental veto. Unwanted pregnancy in a minor can be a far greater threat to physical and mental health than in the case of a healthy unmarried adult. *See* Menken, *Health and Social Consequences of Teenage Childbearing*, 4 Family Planning Perspectives No. 3, at 45 (July 1972). Moreover, illegitimate births among young women in the 15 to 19 age range more than doubled between 1940 and 1968.[6] Teenagers gave birth to an estimated 180,000 illegitimate children during the year 1970. *U.S. Bureau of the Census, Current Population Reports*, Series P-23, No. 36 (1971). However,

> "[t]hese figures do not take into account the number of premarital pregnancies which have forced early marriages. . . . In one state in which figures are available, 48 percent of teenage marriages involved a premarital pregnancy. Approximately one-half of these marriages end in divorce within the first four years." *Statement on Teenage Pregnancy, American College of Obstetricians and Gynecologists* (Apr. 10, 1970).

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[5] *See* Tietze & Lewit, *supra* note 2, at 100, Table 1.

[6] Cutright, *The Teenage Sexual Revolution and the Myth of An Abstinent Past*, 4 Family Planning Perspectives No. 1, at 24 (1972).

By its terms the Fourteenth Amendment embraces the rights of minors as much as adults. The Amendment, for example, defines citizenship as being conferred upon those "born or naturalized" in the United States, not just adults.

Case law, also, repeatedly applies the First, Fourth, Fifth, Sixth and Fourteenth Amendments, and numerous clauses therein, to secure rights for minors.

The First Amendment guarantee against laws "respecting an establishment of religion" has been successfully invoked by school children to bar compulsory prayers. *See Engel* v. *Vitale*, 370 U.S. 421 (1962). Neither *Engel* nor the many other school-prayer and Bible-verse decisions suggest that the minor's right to be protected from government imposed religion could be waived by a parent. Indeed, the presence of a minor with standing to sue was held absolutely indispensable to a similar prayer case in *Doremus* v. *Board of Education*, 342 U.S. 429 (1952). *See also School District of Abington Township* v. *Schempp*, 374 U.S. 203 (1963); *Prince* v. *Massachusetts*, 321 U.S. 158 (1944).

First Amendment free speech rights have similarly been held available to minors and school children. *Tinker* v. *Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969). A majority of the Court in *Tinker* held:

> "School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect. . . ." (393 U.S. at 511).

In no way did the Court suggest that the First Amendment protected only those students whose parents shared their views.

Brown v. *Board of Education*, 347 U.S. 483 (1954), also spawned a line of decisions barring discrimination against minors, not only in access to education, but in numerous respects where neither race nor education was an issue. Indeed, fourteen years after *Brown*, the Court was to hold:

> "[I]llegitimate children are not 'nonpersons.' They are humans, live, and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment." *Levy* v. *Louisiana*, 391 U.S. 68, 70 (1968).

If illegitimate children, regardless of age, are "persons" under the Fourteenth Amendment, *a fortiori*, unmarried pregnant minors have comparable constitutional status.

In virtually all spheres of litigation the minor person has received the protections and benefits of the Bill of Rights. Nowhere has this been more consistently the case than with respect to the rights of minors accused of juvenile offenses.

In re Gault, 387 U.S. 1 (1967), was the fountainhead of juvenile rights in offender proceedings. The case pointedly held:

> "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone." (387 U.S. at 13).

Gault applied the procedural constitutional rights of notice, confrontation, cross-examination, and the privilege against self-incrimination to minors in juvenile proceedings. The Court has repeatedly reaffirmed *Gault*, most recently including the right to insist that proof be beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970).

In sum, a substantial body of case law acknowledges the fact that the Bill of Rights is not marked "adults only." With respect to freedom of religion, free speech, freedom from invidious discrimination, and fundamental fairness in juvenile offender proceedings, a minor is protected by the Bill of Rights, and not excluded as a "non-person."

The cases and language of the Constitution support this approach to the protection of fundamental personal rights in general. Indeed, the reasons behind the Bill of Rights have very little to do with chronological age. Similarly, a young woman's need for medical care to terminate pregnancy is also wholly unrelated to age.

State authority to enforce the obedience of minors to parents is a practice which must be challenged in this area. If one parent can veto an abortion for any reason, another parent may attempt to compel an abortion. The latter was the factual setting of *In re Smith*, 16 Md. App. 209, 295 A.2d 238 (Ct. Spec. App. 1972), where an appellate court in emergency session prevented a sheriff from taking a young woman to the hospital for a forced abortion insisted upon by her mother.

CONCLUSIONS

For the reasons set out, the Court should dismiss the appeal, but grant a petition for writ of certiorari under Rule 20 and affirm the declaratory judgment rendered below.

Respectfully submitted,

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Dated: February 25, 1974.

GERSTEIN ET AL. v. COE ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 73-1137. Decided June 3, 1974

State's appeal under 28 U. S. C. § 1253 from a declaratory judgment of a three-judge District Court invalidating a state statute dismissed for want of jurisdiction, since § 1253 does not authorize appeal to this Court from the grant or denial of declaratory relief alone.

Dismissed for want of jurisdiction; certiorari before judgment by Court of Appeals denied.

PER CURIAM.

A three-judge District Court entered a declaratory judgment holding unconstitutional a Florida statute, Fla. Stat. Ann. § 458.22 (3) (Supp. 1974–1975), which forbids an abortion without the consent of the husband, if the woman is married, and if unmarried and under the age of 18, without the consent of a parent. Because it was anticipated that the State would respect the declaratory judgment, the court declined to issue an injunction against the enforcement of the statute. The State of Florida appeals from the declaratory judgment invalidating the statute. The appeal is dismissed for want of jurisdiction. Title 28 U. S. C. § 1253, under which this appeal is sought to be taken, does not authorize an appeal from the grant or denial of declaratory relief alone. *Gunn* v. *University Committee*, 399 U. S. 383 (1970); *Mitchell* v. *Donovan*, 398 U. S. 427 (1970); *Rockefeller* v. *Catholic Medical Center of Brooklyn & Queens, Inc., Division of St. Mary's Hospital*, 397 U. S. 820 (1970); see also *Roe* v. *Wade*, 410 U. S. 113, 123 (1973). The declaratory judgment is appealable to the Court of Appeals, and we are informed that an

appeal to that court has already been taken. It is suggested that we treat the statement of jurisdiction as a petition for certiorari before judgment in the Court of Appeals pursuant to 28 U. S. C. § 1254 (1). The petition for certiorari is denied.